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SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-460

CLAY L. SHAW,

Respondent-
Appellee Below

versus

JIM GARRISON,

Petitioner-
Appellant Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, affirming an order of the District Court for the Eastern District of Louisiana, granting an injunction against the State's prosecution of respondent for perjury while testifying in a prior trial for conspiracy to assassinate the President of the United States.

I — OPINIONS BELOW

The opinion of the District Court was rendered on May 27, 1971, and is reported at 328 FS 390. The opinion of the Court of Appeals is not yet reported. Both opinions are reproduced in the Appendix.

II — JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on July 31, 1972. No petition for rehearing was filed. Jurisdiction of this Court lies under 28 USC 1254.

III — QUESTIONS PRESENTED

1 - Whether the guidelines set forth by this Court in *Mitchum vs Foster*, 407 US 225 (1972), permit a federal court to enjoin the prosecution of a pending state court criminal action, instituted some two years before respondent asked the federal court to interfere with the state's prosecution not undertaken in bad faith without hope of obtaining a valid conviction, and which can not be said to result in great or "immediate" irreparable injury.

2 - Whether a federal court may enjoin a pending State criminal prosecution for perjury, when the State statute does not regulate expression itself, is not patently unconstitutional on its face, the prosecution does not have any chilling effect on plaintiff's First Amendment rights [*Dombrowski vs Pfister*, 280 US 479 (1955)], and does not constitute great or "immediate" irreparable injury [*Younger vs Harris*, 401 US 37 (1971)].

The Court of Appeals' affirmative answer to the first

of these questions is in derogation of the underlying premise on which the decision of this Court in *Mitchum vs Foster*, 407 US 225 (1972) was based; and requires that this Court further delineate the extent of its holding in that case, that it did "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding", and that an injunction may be granted only when "essential to prevent great, immediate and irreparable loss of a person's constitutional rights" (407 US at p. 243).

The Court of Appeals' affirmative answer to the second question is in direct conflict with the holdings of this Court in *Dombrowski vs Pfister*, 280 US 479 (1955), in *Younger vs Harris*, 401 US 37 (1971) and *Perez vs Ledesma*, 401 US 82 (1971).

It would seem to be appropriate—through the medium of this important case—for this Court to put to rest the vexatious problem as to the right of the Federal courts to enjoin state-court criminal prosecutions.

IV — STATUTES INVOLVED

28 USC 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

42 USC 1983:

> "Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

LRS 14:123:

"Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to matter material to the issue or question in controversy.

"It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false."

V — STATEMENT OF THE CASE

After respondent's earlier attempt to have the Federal courts interfere with his prosecution by the State of Louisiana was rejected [393 US 220], respondent was tried for having conspired in New Orleans to assassinate President Kennedy, and was acquitted by a jury.

In the course of that trial, respondent took the witness stand and is alleged to have committed perjury, when

he denied ever having known either David Ferrie or Lee Harvey Oswald, for which petitioner, the District Attorney for the Parish of Orleans, charged him under LRS 14:123, the applicable statute.

Some two years after the charge of perjury had been filed against him, on the very day on which he was to be tried in the State court, respondent, invoking the jurisdiction of the Federal court, relying on 28 USC 1343(3)-(4), 42 USC 1983 and 1985 (the Civil Rights Act), filed this action, seeking the intervention of the Federal Court to enjoin his prosecution, apparently attempting to bring this case within the ambit of *Dombrowski vs Pfister*, 380 US 479 (1965).

The District Court found that the proceeding against respondent for conspiracy to assassinate President Kennedy and the perjury charge were brought in bad faith, and issued a permanent injunction on the ground that "such bad faith constitutes irreparable injury which is great and immediate", because if respondent "is forced to stand trial for perjury, takes the stand and is acquitted, this court has no doubt that plaintiff will be charged anew on the basis of statements made by him from the witness stand" (328 FS at p. 403).

In the injunction proceeding below, petitioner filed a list of ten key witnesses—four of whom had not testified during the conspiracy trial—whom he intends to call at the trial of the perjury charge, together with a brief statement as to what the testimony of each is expected to be, which testimony would clearly be sufficient to warrant "a valid conviction" by a jury. *Perez vs Ledesma*, 401 US 82, 85 (1971).

On appeal, the Court of Appeals relied almost exclusively on, and quoted extensively from, the opinion of the District Court*; and affirmed the issuance of the injunction, for the stated reason "that it is unnecessary to go beyond the bad faith nature of the perjury prosecution to affirm the judgment" (Slip. Opin., pp. 3-4).

In holding that the sole "finding of a bad faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in *Younger*" (Slip Opin., p. 21), the Court of Appeals misconstrued this Court's opinion in *Younger vs Harris*.

VI — REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Further Delineation of This Court's Holding in Mitchum vs Foster is Required

In the very recent case of *Mitchum vs Foster*, 407 US 225 (June 19, 1972), this Court held that § 1983 of the Civil Rights Act is an express Congressional authorization for injunction, within the meaning of the exception to the federal anti-injunction statute (28 USC 2283); but the Court did "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding" (407 US at p. 243).

The Court again recognized that such an injunction may be granted only in those rare circumstances when

* The cavalier attitude, and lack of independent thought on the part, of the Court of Appeals, in preparing its opinion, is evidenced by its statement (Slip Opin., p. 14) that "Russo, asserting his Fifth Amendment privilege, declined to answer any questions when put on the stand in the perjury trial". Obviously there has not yet been any perjury trial.

it is "essential to prevent great, immediate, and irreparable loss of a person's constitutional rights" (407 US at p. 243).

This case really does not involve civil rights. There is no question of free speech involved here, as there was in *Dombrowski vs Pfister*, 380 US 479 (1955). Nor is there "some racial, or perhaps otherwise class-bred, invidiously discriminatory animus" [*Griffin vs Breckenridge*, 403 US 88, 101-101 (1971)], behind the state's perjury prosecution sought to be enjoined.

It is well settled that one may be prosecuted for perjury committed while testifying in his own behalf in a prior proceeding. *United States vs Williams*, 341 US 58, 62 (1951). The jury may well have believed that respondent knew Ferrie or Oswald, and still have acquitted him on the charge of conspiracy: "In this situation, the authorities dealing directly with perjury prosecutions clearly hold that when the fact is not *necessarily* determined in the former trial, the possibility that it may have been does not prevent reexamination of that issue." *Adams vs United States*, 287 F2d 701 (CA 5-1961).

There is, in this case, no "threat to the plaintiff's federally protected rights . . . that cannot be eliminated by his defense against a single criminal prosecution". *Younger vs Harris*, 401 US 37 (1971), at p. 46. Moreover, this case cannot be said to be one "undertaken by state officials in bad faith without hope of obtaining a valid conviction". *Mitchum vs Foster*, 407 US 225 (1972), quoting *Perez vs Ledesma*, 401 US 82 (1971), at p. 85.

Certiorari should be granted to permit this Court to delineate the extent of its holding in *Mitchum vs Foster*, that while a civil rights action for injunction of a state court criminal proceeding, is not precluded by the federal anti-injunction statute, it should be viewed in light of "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding" (407 US at p. 243).

-b-

Conflict with This Court's Opinion in Younger vs Harris

In *Younger vs Harris*, 401 US 37, at p. 43 (1971), this Court recognized that "since the beginning of this Country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts"; that "during all this lapse of years from 1793 to 1970 the statutory exceptions . . . have been only three", as set forth in 28 USC 2283; and that a judicial exception "has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in a state court is not enjoined, suffer irreparable damages".

In that case, Justice Black emphasized that there must not only be "the traditional prerequisite" of irreparable injury, but that, "in addition . . . even irreparable injury is insufficient unless it is 'both great and immediate'" (401 US at p. 46).

Respondent did not initiate his action seeking to enjoin the State Court proceeding against him for perjury, until some two years after the charge of perjury was

filed against him by petitioner, and on the very day that his trial for perjury was to commence in the State court. Such belated action cannot conceivably be predicated on both great and "immediate" irreparable injury.

Much emphasis has been placed by respondent on the asserted bad faith of the District Attorney in bringing respondent to trial for having conspired in New Orleans to assassinate President Kennedy. But the facts stand undisputed that the District Attorney proceeded with that trial only after (1) a three-judge State court had held that there was probable cause for respondent to be brought to trial; (2) after a Grand Jury had indicted him for such conspiracy; and (3) after this Court had affirmed his right to do so. *Shaw vs Garrison*, 393 US 220 (1968).

In any event, it is not that trial which respondent is now asking the federal courts to enjoin, but the subsequent and distinct prosecution brought against him for having committed perjury while testifying in the prior trial.

Even should respondent take the stand in his defense of the perjury charges, and reiterate his prior testimony denying having known Ferrie and Oswald, and be acquitted by the jury, respondent could not, under the doctrine of double jeopardy or res adjudicata, be subject to another charge of perjury. *Commonwealth vs Spivey*, 243 Ky. 483 (1932).

It is accordingly submitted that the holding of the Court of Appeals, affirming the permanent injunction against respondent's prosecution in the State court for

perjury, is in contravention of the holdings of this Court both in *Dombrowski vs Pfister* and *Younger vs Harris;* and this Court should take jurisdiction of this case to review the holding below which, if allowed to stand, would serve to destroy the well-recognized public policy against Federal intervention in State criminal prosecutions.

VII — CONCLUSION

Certiorari should be granted to enable this Court to set a limit to the exception to "the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the State and their institutions are left free to perform their separate functions in their separate ways". *Younger vs Harris*, 401 US at pp. 43-44.

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and

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Of Counsel

September, 1972

CERTIFICATE

It is certified that copies of the foregoing petition were served on respondent this date by mailing same to his counsel of record as required by Rule 33-1 of this Court.

New Orleans, September ____, 1972.